Colloquy

—Tr. Tr. 412—

The Court: And I do not see why we need have so many various and sundry protests against the same identical thing. I have ruled on it.

Mr. Gladstein: I know, but—

The Court: You have been protesting vigorously from the beginning. How do you suppose it avails to continue to protest and have the jury sent out of the room, with the inconvenience that occurs to everybody while you say over again what you said before?

* * * * * *

—Tr. Tr. 421—

The Court: Well, it is the old story. We have argument when I ask counsel again and again not to do it, but there seems to be no way whatever to get you lawyers not to argue. I suppose the only thing for me to do is to tell you again not to do it and then let the record speak for itself.

Mr. McCabe: Well, without citing the other instances—

The Court: I do tell you again now not to do it.

—Tr. Tr. 422—

Mr. McCabe: My point was that Mr. Johnston, despite your Honor's 12 or 13 different injunctions and admonitions that you wanted a revelation of any bias—in fact, with Mr. Reese, you yourself suggested, "Don't you think the fact that you knew Mr. Coakley, that that would have an influence on you?" You suggested that and excused him. Despite all that, Mr. Johnston, who is an honest man, sat there and did not reveal the bias which was in his mind

all the time, which was brought out through a chance remark concerning the Holy Name Society, and that bias was not generated in the jury box.

The Court: Mr. McCabe, you have committed in my immediate view and presence here in the last few moments a deliberate and wilful contempt. I just want you to realize it. I don't know how many times you are going to do it. I am not going to start any contempt proceedings now, but what I may do hereafter, I don't know. But I want to have it plain that what you have done just here a few moments ago is a wilful and deliberate disobedience of my command.

Mr. McCabe: You mean with respect to argument?

The Court: If you desire to go further, after what I have told you, why, that is up to you, but I don't really see how any self-respecting member of

—Tr. Tr. 423—

the bar can do it.

Mr. McCabe: Well, then, I will refrain from anything else. I certainly intended no contempt, your Honor.

The Court: Well, you see—

Mr. McCabe: I was bringing out your Honor's efforts to draw from the jury any bias, repeated efforts, which had not, in view of the generality of the questions, that's all. Finally the bias was acknowledged by the juror, and he obviously wanted to be perfectly honest on it, and then your Honor excused him, and then it was pointed out, at the direction of the—

The Court: You don't think you are going to provoke me into any hasty action? You are not going to do it. You should know it by this time, and there is no use continuing those efforts.

Mr. Gladstein: May I state my objections for the record?

The Court: Yes.

Mr. Gladstein: I object, first, on behalf of my clients to the manner in which the Court has conducted the questioning, for the reason, first, that it has placed me, as the representative of two defendants here, in a position such that when a seat in the jury box is vacated and a person from the back of the room is called to that place, in so far as

—Tr. Tr. 424—

everything that has occurred prior to that time in the questioning by the Court, that person who takes that seat is, to me, a masked person, a person about whom I know nothing, a person whom I have been unable to observe, a person—

The Court: Do you realize, Mr. Gladstein, that the noting of your objection could be very briefly stated without argument?

Mr. Gladstein: That is the first aspect of my objection, to the manner in which the Court conducted the examination. The second aspect is that the Court committed prejudicial error in so far as the rights of my clients are concerned when the Court said to the jurors, and to us in effect, that the Court did not desire to pry into the personal affairs of

the jurors and placed, by necessary effect, placed me in a position where, merely by asking that the Court request information in the usual manner on usual matters concerning the employment and activities and the location of not only the juror but those in the immediate family of the juror, it placed me in the position where, by pressing for the asking by this Court of those usual questions, I was placed in a light whereby the jurors might think I was seeking to pry into their personal affairs improperly.

I next want to object to the content of the Court's

—Tr. Tr. 425—

questioning, and particularly of the formulation to which Mr. McCabe has adverted, and I desire particularly to say that, so far as that type of question is concerned, my objection goes to the proposition that it does nothing to ascertain the state of mind, in fact, of the juror; and I will disagree with Mr. McCabe to this extent, I don't even think the juror is permitted to be an honest and fair judge of the existence or non-existence of bias, prejudice, interest or any other state or frame of mind that would make it improper for the juror to sit.

I object to the Court's formulation of that type of question because it does not tell, it does not advise the juror as to those things that the juror must ask himself in order, if he gives an honest answer, to enable him to know whether he could be fair.

The Court: You realize, Mr. Gladstein, that instead of noting an objection, you are making an argument.

Mr. Gladstein: I intend only to note an objection.

Colloquy

My third point of objection—

The Court: Don't think you are fooling me.

Mr. Gladstein: I did not intend to fool your Honor or anybody else. I intend simply to state—

The Court: I know the difference between noting

—Tr. Tr. 426—

an objection and making an argument; but if you desire, contrary to my express command, to go on arguing, you may do so.

Mr. Gladstein: Your Honor, I am stating the grounds—

The Court: I am not going to use any physical means to stop you.

Mr. Gladstein: I am stating the grounds of my objection.

The Court: Go ahead.

Mr. Gladstein: My third objection is to the direction of the Court with respect to the number of preemptory challenges to be exercised, the manner in which they are to be exercised and the order in which they are to be exercised. By this direction—

The Court: Now, period. That is the end of the point.

Mr. Gladstein: Can I not—

The Court: The rest is argument.

Mr. Gladstein: Can I not say the grounds of my objection?

The Court: I think you have stated a sufficient objection. I don't see that there is anything that need be added. If you are right, you are right. That is all there is to it. I am not going to change that ruling.

Colloquy

—Tr. Tr. 427—

Mr. Gladstein: Very well. I now object to the Court's statement which forces me, by virtue of what the Court has already said, particularly, to Mr. McCabe and also to me, forces me to sit down, unable to—

The Court: Forces you to sit down, Mr. Gladstein, after you submitted briefs on this same point to me yesterday? Both sides submitted briefs. Now you stand there and assert that I am in some way prejudicing you by not letting you argue more, is that the point?

Mr. Gladstein: Your Honor, the briefs are not a matter of record and what I say here I trust is a matter of record. It is intended to be a matter of record, and I intended to state my objection and the grounds for it.

The Court: I don't desire to hear any argument. Does other counsel desire to be heard?

* * * * *

—Tr. Tr. 454—

New York, March 11, 1949

* * * * *

Mr. Gladstein: Well, I want first to address myself to the requirement that we be required at this time to begin the exercise of peremptory challenges. I want the record to show that I am not satisfied at all in respect of any of the 12 jurors in the jury box as regards my right to challenge for cause. My ground for that objection is that I submit there has been inadequate effort to obtain expressions from

—Tr. Tr. 455—

each and all of the jurors so as to establish what the frame or state of mind of the jurors may be. Hence I am in a position where I am required to exercise peremptory challenges blindly. Moreover, I am in a position where I cannot appropriately ask for the completion of the examination for the purpose of establishing the existence of facts which would establish the basis for a challenge for cause against one or more of the jurors. Therefore, for the record, I challenge for cause each and all of the jurors.

The Court: The challenge is overruled.

Mr. Gladstein: Now I want to say that without further examination of the jurors, I object to the requirement that compels me to exercise peremptory challenges against jurors concerning whom I have inadequate information as a result of the only, and I submit, inadequate and improper examination of the jurors by the Court, and hence I am placed in the position of choosing between strangers, choosing whether to challenge persons concerning whom I have inadequate information—inadequate in the sense that the questions have not brought out that which normally and usually and traditionally is brought out in the case so that an intelligent and an informed exercise of a peremptory challenge may be had. Consequently I am placed in a position, and for that reason I object—I am placed in a position

—Tr. Tr. 456—

of exercising peremptory challenges against persons in the jury box whose acceptability as jurors has

not been established in one way or another and as to which I am unable to do anything.

Now I further want to record my objection to the statement just made by the Court which requires the exercise of three challenges at a time. I object to that. I submit that the appropriate thing to do is to permit the challenging of one juror; when that seat is vacant, another be called and questioned, and that the challenges be exercised in an orderly manner one by one; that at no time should there be, as a result of the exercise of a peremptory challenge, more than one seat vacant to be filled by another prospective juror.

The Court: Perhaps you, coming from outside of the State, are not familiar with the practice here.

Mr. Gladstein: That is possible, your Honor, but I want to say that coming from outside of the State I come with experience in the Federal courts in Hawaii, Washington, Oregon, California and Arizona. In none of those States is any practice followed which conforms to this. To the contrary, in all of these States the practice is, as a matter of fact, first of all, to require the Government to exercise the first challenge and the defense has the right

—Tr. Tr. 457—

to exercise the last challenge. And, moreover, the alternation between prosecution and defense is somewhat different than is here laid down. Also only one seat at a time is vacated by the jurors.

The Court: Well that is not done here.

Mr. Crockett: May it please the Court, on behalf of my clients I should like to adopt the objections

just made to the Court by Mr. Gladstein, and I predicate them upon my contention that they amount to a denial of due process of law to my clients, and that they amount to a denial of their right to a fair and impartial trial, both of which rights are guaranteed by the United States Constitution.

Mr. Isserman: If the Court please, I am obliged to object on the grounds urged by Mr. Gladstein and Mr. Crockett, and also wish to repeat here, without doing it at length, the objections made to the procedure made yesterday by counsel to the procedure which was followed by the Court, and adding my last ground that the total sum or the total effect of that procedure has been to deny my clients the right to a fair trial before an impartial jury in violation of the Constitution.

Mr. Sacher: I wish to interpose an objection on behalf of my clients, your Honor, on the ground that the nature of the examination of the jurors thus far,

—Tr. Tr. 458—

as well as the order in which the challenges are to be exercised and the number to be simultaneously exercised, deprives us of the ability to make an intelligent judgment as to which, if any, jurors are to be challenged peremptorily; secondly, that the requirement that three be exercised simultaneously, no matter how hallowed it may be by time, is an inherent injustice because it operates in form to give us more than the ten challenges which are secured to us by Rule 25—24, rather, but in actuality may operate to give us no more than six challenges.

The Court: The authorities seem to be against you on that, Mr. Sacher.

Colloquy

Mr. McCabe: I would simply like to add to the objections made by other counsel, your Honor, that your Honor's formulation of insisting that we exercise three challenges before we see and have a chance to hear answers to questions for the replacement of the first challenge, compels us to exercise our peremptory challenges without proper information and may very well lead not only to the wasting of a peremptory challenge in rejecting a juror who, in comparison with his replacement or with the replacement of the second juror challenged, may have been under the circumstances preferable to us.

The Court: Now there is one thing that I am

—Tr. Tr. 459—

very much puzzled about here in this trial. I don't know how many times, but it must have been—well, I think five or six anyway, I have stated that when one counsel or counsel for certain defendants makes an objection or notes an exception, that that inures to the benefit of all of the defendants, in the same manner and effect as though the counsel for each of the other defendants have stood up and repeated them, except in such instances where one of them desires to express his disassociation with the objection or exception. That being so, I cannot see why it does the slightest good to anyone to have one man state an objection and then each of the other counsel get up one after the other and repeat the same thing. I merely suggest that that consumes time and energy and is quite unnecessary.

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Colloquy

—Tr. Tr. 660—

New York, March 14, 1949

Mr. Gladstein: May I approach the bench?

Mr. Sacher: May we approach the bench?

The Court: All right.

(The following discussion occurred at the bench between Court and all counsel, not in the hearing of the prospective jurors:)

Mr. Gladstein: I want to challenge for cause all of the jurors who have been put into the jury box since my previous challenge for cause as to all of them upon all the grounds heretofore stated, particularly the inadequacy of the Court's inquiry to enable us to obtain from the jurors the facts, circumstances, names, organizations, expressions of opinion they have given or have heard, opinions formed, and so on, regardless of whether or not the jurors think that they are able to keep their minds open. We should have the right to learn from the jurors all the facts and circumstances that would

—Tr. Tr. 661—

assist us in exercising peremptories.

The Court: Overruled.

Mr. Sacher: I have an observation. I think that, particularly in regard to Jurors Nos. 5 and 11, that they ought—

The Court: Do you think it is proper for me to hear this in this fashion, Mr. McGohey?

Mr. Sacher: It is the only way it is heard.

Colloquy

The Court: I thought it was just once or twice, but now it is a regular thing every time there is a challenge to be exercised. I wonder. What do you think?

Mr. Sacher: In the light of new facts developed, I think we ought to have the right to lay them before your Honor for consideration.

The Court: I do not see why it should not be out in open court just like everything else. This huddling around does not impress me. I thought it was just once or twice, but if you are going to do it every time you challenge somebody else—

Mr. Sacher: These defendants—

The Court: No, I won't hear you any more this way. You make your objections in open court.

Mr. Sacher: I want to object on the record upon the ground that what you are ordering is prejudicial to the defendants.

—Tr. Tr. 662—

The Court: It happens all the time.

Mr. McGohey: That is what happens in every criminal case.

The Court: Very well. You go make your objections out in the open.

Mr. Sacher: And I want to object to the tone of voice in which your Honor said it.

The Court: My tone?

Mr. Sacher: Within the hearing of the jury.

The Court: I hardly spoke loud enough to be heard two feet away.

Mr. Sacher: Waving me aside from the bench—

The Court: I didn't wave you aside.

Colloquy

Mr. Sacher: —in the full view of the jurors. I saw it done.

The Court: I deny it.

Mr. McGohey: Let the record show that I saw no gesture by the Court which in any way could be construed as waving anybody away from the bench.

Mr. McCabe: And I certainly would like to put my comment on the—

The Court: You cannot do it here. You must do it back at the table.

(The following in the hearing of the prospective jurors:)

. . . . . .

—Tr. Tr. 697—

New York, March 15, 1949

. . . . . .

The Court: —you and your colleagues have made that argument to me a very considerable number of times in various ways and with various wording. I have indicated my ruling on it. I have also said, and I repeat, that any objection that is made on behalf of one or more of the defendants will inure to the benefit of all so that each counsel need not get up and repeat the substance or effect of what some other counsel has said because his own clients get the advantage of the objection and the exception.

. . . . . .

Colloquy

—Tr. Tr. 750—

Mr. McGohey: And I object to any argument before this jury about matters that were argued for seven weeks and disposed of by your Honor.

Mr. Sacher: But I object to Mr. McGohey's reference to seven weeks because he rises to object to something I have just mentioned—

The Court: Maybe it is better, Mr. Sacher, to let you go your own way, but I think possibly it may not be beneficial to you or to your clients; but I think you may argue as you see fit. I will listen.

Mr. Sacher: I wish to note an objection to your Honor's remark. I wish also to object to Mr. McGohey's interruption and his remarks because the things that I was recently addressing myself to and which apparently promoted him to rise were my reference to the number of employes and former employes of the Metropolitan Life Insurance Company who have paraded through the jury box.

The Court: How long do you think you will take with this argument, Mr. Sacher?

Mr. Sacher: It may take me some 15 minutes, your Honor.

The Court: Very well, we will listen. 15 minutes.

—Tr. Tr. 751—

I shall allow you.

Mr. Sacher: And if it will serve the convenience of the Court or the jury I shall make every effort to shorten it as much as possible.

I should like to observe in addition that, apart from the fact that the number of Metropolitan Life Insurance Company employes and former or retired employes who have been among the jurors called

for service in this box, is altogether disproportionate to the total number that have appeared in the box; secondly, I should like to observe that the position which Juror No. 9 holds with the Metropolitan Life Insurance Company is of such a character as that I respectfully submit he would properly have to be classified as being among the salaried servants of the Metropolitan Life Insurance Company. His point of view—

The Court: By the way, do you object to the disproportion of women—

Mr. Sacher: What is that, your Honor?

The Court: Do you object to the disproportion of women?

Mr. Sacher: I wish to object to that question. The ladies, God bless them, I love them and I have no objection to their being there. I welcome them.

The Court: I thought you might think there were

—Tr. Tr. 752—

too many.

Mr. Sacher: What is that, your Honor?

The Court: That is all right.

Mr. Sacher: I should like to observe, your Honor, that your question had no relevancy whatever to what I said, and it throws me off the track.

The Court: Well, you contend there were too many of one sort or another.

Mr. Sacher: Well, what has being an employe of a large life insurance company got to do with the sex of a juror? I do not see the relationship.

The Court: Well, possibly in view of the nature of your challenge that there was some question in your mind about it—

Mr. Sacher: No. The Supreme Court of the United States has said that there is no fundamental difference between the thinking of American men and American women, but there may be a difference between the thinking of the salaried servants of large corporations who are necessarily identified with the point of view of those large corporations, which requires us to make a differentiation between their point of view and the point of view of the rest of us who are not so employed and so identified.

Now when all these facts are borne in mind and

—Tr. Tr. 753—

when the Court bears them in mind the great efforts which my client, Mr. Benjamin J. Davis, has made on behalf of the Negro people, specifically against the Metropolitan Life Insurance Company and more specifically against its Jim Crow policy in Stuyvesant Town, and has fought for, insisted and introduced in the New York—

The Court: Now I am beginning to get your drift. I do not want to hear any more argument on it, Mr. Sacher. You will please desist. I will overrule your objection.

Mr. Sacher: Now, your Honor, I just—

The Court: I thought at first differently, but I see now the drift of your remarks, and I tell you that I do not desire any further argument on this. I will overrule the objection and you may proceed with your peremptory challenges.

Mr. Sacher: If the Court please, I wish to note an objection—

The Court: That is all right.

Mr. Sacher: —to the Court's ruling. You have cut off my argument at the very moment when the most telling basis—

The Court: Yes, when I saw it was designed for some persons out of the courtroom rather than in the courtroom.

—Tr. Tr. 754—

Mr. Sacher: Your Honor, I wish to object to that characterization. There are only 13 people in this courtroom to whom I wish to address my remarks; that is to your Honor as the Court and to the 12 men and women who constitute the jury.

The Court: Well, I am the only one to whom discussion should be addressed on this question.

Mr. Sacher: And I am doing that.

The Court: And I overrule your objection.

Mr. Sacher: I respectfully except and I except to the manner in which and the time at which your Honor cut off my argument in support of the challenge.

* * * * *

Mr. Gladstein: I desire to file a challenge for cause against a juror who, I submit, should be excused by the Court on the basis of cause, legal cause. That juror is Juror No. 5.

* * * * *

—Tr. Tr. 758—

The Court: The challenge is overruled.

Mr. Gladstein: But wait, your Honor, I haven't completed.

The Court: Well, it seems to me—

Mr. Gladstein: May I—

Colloquy

The Court: It seems to me—

—Tr. Tr. 759—

Mr. Gladstein: But I haven't completed the grounds of my objection and I desire to continue.

The Court: Now perhaps you had better go on.

Mr. Gladstein: I think your Honor's determination is a little bit hasty because there are two other facts—

The Court: I see no merit in the challenge, none whatever.

Mr. Gladstein: Well, add to what I have said the juror's own statement that he has pending at the present time an application for employment with the Veterans Administration,—I think I have stated the record correctly? Now it is no secret to any of us that before a person can now obtain employment with any branch of the United States Government, certain procedures take place, certain processes. They are called, your Honor, loyalty; but what happens is that a person must make—

The Court: Now that I will not permit you to go on with, Mr. Gladstein.

Mr. Gladstein: But, your Honor—

The Court: That is not the basis of objections. You are going into a lot of this talk about what you say you know—

Mr. Gladstein: No.

The Court: —and so on, and I will not have it.

Mr. Gladstein: I am simply—

—Tr. Tr. 760—

The Court: That is all there is to it. This is a certain procedure that you are going to hold on and hold forth, and I will not hear it.

Colloquy

Mr. Gladstein: I am not going to do that; I am going to refer to the kind of procedure that is going—

The Court: Well, you have referred to it enough.

Mr. Gladstein: My point is that if a man has pending an application for employment with the Veterans Administration, and if, as is true, certain qualifying procedures have to take place; if, as it is true, he hopes to obtain that position, can it be doubted that a person is placed in an untenable position if he is at the same time required to sit in a case of this kind where the issues as they are, and at the same time ask that person not to feel the pressures that naturally exist in the light of his ambition to achieve a position with the Veterans Administration, a branch of the Government? That creates certain conflict of interests and gives rise to certain motivations and biases, which are perfectly natural, but the very fact that they exist requires that such a person not, in all fairness to himself as well as to the defendants—

The Court: Can you state the matter with less

—Tr. Tr. 761—

argument, Mr. Gladstein? Usually a statement of an objection can be made without so much argument.

Mr. Gladstein: Well, your Honor—

The Court: Is there some further point that you desire to make?

Mr. Gladstein: There is. Now there is a third aspect of the juror's testimony that I desire to call your Honor's attention to. Here again I am not intending to be personal at all but I ask your Honor to weigh the import of the fact, along with

the other two things that I have said, the juror is a member of a religious society—and there is no question of his right to belong to it, but—

The Court: If you think that disqualifies anybody in this court you are making a big mistake.

Mr. Gladstein: Your Honor's interruptions have made it impossible for me to say what I intend to say, that I do not question the right of a person to belong to any organization, be it religious or otherwise, and I do not say that that constitutes a basis for challenge, but if your Honor will permit me to finish. Now what I want to say is that a person who belongs to such an organization presumably supports its activities, and the organization that the juror belongs to happens to be engaged in activities that—

—Tr. Tr. 762—

The Court: Now I will not hear that, Mr. Gladstein. I have had enough here of these statements—

Mr. Gladstein: These are not religious activities I am talking about.

The Court: I am not going to have any more of it. The challenge is overruled.

Mr. Gladstein: I do make an offer of proof—

The Court: And you will desist from further argument.

Go ahead with your peremptory challenges.

Mr. Gladstein: Will the record show that I desire to make an offer of proof?

The Court: These fulminations here about statements of fact of one kind or another—

Mr. Gladstein: Your Honor—

Colloquy

The Court: —we are not going to have any more of this in this trial. You might just as well make up your mind as to this.

Mr. Gladstein: This is not a question of religious activity, your Honor, but a question of political activity.

The Court: Well, whatever it is, we are not going to do it on your sayso.

Mr. Gladstein: I got it out of that box.

The Court: We are going to take it from the

—Tr. Tr. 763—

jury box.

Mr. Gladstein: I ask your Honor to follow up that question.

The Court: I have asked all the questions that I intend to ask of these jurors on the voir dire, and you will now proceed with your peremptory challenge.

Mr. Gladstein: Very well. I take exception to your ruling.

. . . . . .

—Tr. Tr. 785—

. . . . . .

Mr. Sacher: In the meantime, your Honor—

The Court: Do you have more motions, Mr. Sacher?

Mr. Sacher: Is that sarcasm or an inquiry?

The Court: No, an inquiry.

Mr. Sacher: Just an inquiry.

The Court: I asked you if you have some more motions and you take offense at that question.

. . . . . .

Colloquy

—Tr. Tr. 828—

New York, March 16, 1949

Mr. Crockett: As your Honor will recall, I was excused from attendance upon the Court, and, as a result, I was not present on yesterday, at which time there was some discussion concerning a motion that had been addressed by me to the Court on Monday a week ago, March 7th, and what had transpired since that time with reference to that motion.

In reading over the record, I notice, or, rather, I got the impression that there were definite implications in some of the remarks by the prosecution to the effect that I had been guilty of some conduct unbecoming a lawyer.

It is the first time in my 15 years of practice that any such inference has been made. I have always tried to respect the Court, to treat opposing counsel with courtesy, and I expect similar treatment from opposing counsel. Therefore, whenever any such in-

—Tr. Tr. 829—

sinuation is made, I reserve the right, not only to express my resentment, but to explain to the Court, as best I can, exactly what happened.

The Court: Well, your conduct in this trial has not been irreproachable.

Mr. Crockett: Well, I might take exception to your Honor's remark in that respect, and I do take exception.

Mr. Gladstein: And I do too, not simply because the remarks were directed against Mr. Crockett, but I, as an attorney who has been sitting here partic-

ipating in this case from the outset, submit that the remarks of the Court, addressed to Mr. Crockett, concerning him, are absolutely impermissible, unwarranted, unjustified, and I take strong exception to that kind of remark.

The Court: Your conduct has been even worse, Mr. Gladstein.

Mr. Gladstein: And I object to that remark and take exception to it, although I must confess that I am not surprised to hear your Honor say that.

* * * * *

—Tr. Tr. 841—

Mr. McGohey: Now if your Honor please, I have not been personally involved in the controversy between Mr. Gordon of my staff and Mr. Crockett. Now if we are going to get into this as to who is in the corner, these observations by Mr. Crockett, then I shall have to insist on some kind of a hearing, but I agree with your Honor that it ought not to be done. As I view the case now, as I see the situation, it is this, that there was an affidavit given, that

—Tr. Tr. 842—

it was taken, that it wasn't returned. So much is agreed by both of us now. Now we are informed, and for the first time, by Mr. Crockett, that the affidavit which he admits he took from us on Friday is the same affidavit or the same papers which appear in a motion which was submitted yesterday afternoon by Mr. Sacher. Since Mr. Crockett says that those are the same sheets of paper that he took from us on Friday and that this constitutes a return of them, I will accept that, your Honor.

Mr. Sacher: I should say that I told Mr. McGohey yesterday that what he had was the paper that he was talking about.

Mr. McGohey: Now if your Honor please—

Mr. Sacher: Your Honor saw something sinister about that.

Mr. McGohey: May I please be permitted to finish my statement?

The Court: Yes. Mr. Sacher, please do not interrupt.

Mr. Sacher: Does Mr. McGohey have these prerogatives of making long arguments? You will hear argument from nobody except Mr. McGohey on what appears to be a triviality.

The Court: Mr. Sacher, please don't be offensive. When one lawyer arises to interrupt another it is

—Tr. Tr. 843—

something I do not like to see, and then when I suggest that you do not do it and you make another one of these comments, the plain import of which is that I give one treatment to the prosecution and a different treatment to the defense, I consider that offensive and not respectful to the Court, and so I ask you, please don't do that again. You may except to anything that I do. You may object to my conduct in any way, but these insinuations which attack my honor and my integrity are distasteful to me, are quite unnecessary and I wish you would please stop it.

Mr. Sacher: May I renounce any intention to attack the Court's honor or the Court's integrity.

The Court: Well, your language is singularly ill-chosen, then.

Colloquy

Mr. Sacher: Well, I notice that your Honor has enumerated two things: you said I may object and I may except, and I simply request of the Court the information as to whether that same rule will apply to the prosecution attorneys or whether they, in addition to those two things, may have extended argument and we be denied argument?

The Court: Well, it has happened too often, not only by one or another but many of defense counsel, these sly insinuations that I am giving one kind of

—Tr. Tr. 844—

treatment to the prosecution and a different kind of treatment to the defense, and that I am doing that in some sort of persistent fashion. I consider that a direct affront to my honor and integrity, and it is not to be tolerated that lawyers at the bar speak that way to the Court, particularly when there is absolutely no foundation for it.

Now I listen to argument when I think argument will help me, and when I feel that it will not then I ask lawyers to please not do it. I have done that on both sides. Naturally I have done it more often where the offense has been more frequent and where the occasion for the comment has been more frequent, but I can assure you that I have no idea at any time in this case of giving any different treatment or any different consideration to counsel for the defense than I do counsel for the Government.

Mr. Sacher: Well, I am happy to have that assurance from the Court.

* * * * *

Colloquy

—Tr. Tr. 1044—

New York, March 17, 1949

Mr. Sacher: If your Honor please, out of an abundance of caution, may I ask whether the disposition which your Honor has indicated in regard to the accrual of the benefit of objections made by one to all will apply—

The Court: Yes, at all times during the whole trial.

Mr. Sacher: I understand that, but that will apply also, I take it, to Mr. Dennis throughout the trial?

The Court: Oh, I think so. I see no reason why—I see reason why I should be all the more anxious to give him the benefit of it, and I do so, and I think that it is going to be very helpful here if, as we get ahead with this trial, you all bear in mind that an exception or an objection made is really for the benefit of all of those, so that this getting up, one after another, which I can understand sometimes a man feels he should do, may be avoided. I think you will find things will go so much smoother and to the

—Tr. Tr. 1045—

advantage of everybody concerned, including all the defendants, if you will avoid that, but I give no direction that you must not do that. I really desire to avoid directions of that kind throughout the trial. They are contrary to my way of doing, and I find that lawyers, with a little leeway, a little flexibility, are much more likely to go along smoothly than if you start giving all kinds of directions that circumscribe their way of speaking and so on.

Colloquy

—Tr. Tr. 1165—

New York, March 21, 1949

* * * * * *

Defendant Dennis: We will show with what peaceful intent we taught and advocated, amongst other things, to continue where I left off, to oppose American support to the unjust and criminal war against the Chinese people waged by the miserable Chang Kai Shek, to oppose the civil war against the Greeks, waged by the monarchist-fascist puppet of the American trusts, with the American people footing the bill, to oppose the Anglo-American oil lords against the new State of Israel, and the people of Indonesia, and to oppose the restoration of the German and Japanese monopolies and was potential under the new management of the American cartelists. And the defense will establish that we Communist leaders saw that American national security and universal peace were weakened and were not strengthened by the Truman doctrine and the Marshall Plan. We will show that we teach that the North Atlantic Pact, now being rushed to signature—

Mr. McGohey: If your Honor please, the North Atlantic Pact was only signed the other day. We are talking about something that happened in 1945.

The Court: I will not let that go on any more.

—Tr. Tr. 1166—

It is so plainly irrelevant. It is just using the courtroom for the purpose of propaganda; and I won't have it. Now please desist from any further opening or alleged opening along that line.

Colloquy

Defendant Dennis: I object to that statement, your Honor. Do I understand it is the ruling of the Court that I cannot offer proof of either my intent, what I have advocated, what I have taught, what I have done during the period covered by the indictment?

The Court: Well, those things that you just have been talking about there do not seem to me to be very relevant to the charge, whether you were conspiring—

Defendant Dennis: Those are the things, your Honor, that actually I and my co-defendants did and not this Goebbels-like charge contained in the indictment.

The Court: Well, you will kindly refrain from any further reference to Chang Kai Shek and the war in Spain and everything else under the sun. That seems to me to have nothing to do with the case. Try to get down to what you are charged with here.

Defendant Dennis: Your Honor, may I continue?

The Court: Yes, but please eliminate those things that I have just spoken of.

Defendant Dennis: At this time I would like to

—Tr. Tr. 1167—

establish further that in our work and efforts to secure a lasting peace for our people that we consider that World War III is not inevitable. May I deal with that?

The Court: What has World War III got to do with the case?

Defendant Dennis: It is very important for the American people, and it is what we have taught

and advocated in this period, your Honor, and I am very particular—

The Court: Well, I cannot see that World War III has anything to do with whether you were a party to this conspiracy or not. I suppose it is easy to get off everything else under the sun and maybe we will forget what the charge is, but I am not likely to do that.

Mr. Isserman: If the Court please, on behalf of my clients I object to your Honor's comments.

The Court: Yes, I know.

Defendant Dennis: To conclude on this point, then, your Honor, I and my co-defendants will show, we will show that we publicly advocated that all peace-loving Americans should unite that the Truman Administration enter into direct negotiations with the U. S. S. R. and respond in good faith to its repeated disarmament and other peace proposals.

—Tr. Tr. 1168—

The Court: I knew you were going to do that. You are going to be an awful problem to me, I can see that. I tell you to stop and you go right on. I suppose the best thing to do is to just take it cheerfully. Go ahead.

Defendant Dennis: We will show that we taught that Americans must take their choice between a pact with the Soviet Union or an aggressive alliance against our most powerful World War II Ally, and against other democratic people.

We Communist leaders will prove that in this we have acted with wilful intent to save our country from the devastation of bombing and invasion and our people from the horrors of another World War.

We will prove that we have attempted wilfully to realize what is popularly known as Roosevelt's great design for a lasting peace and hence with the purpose directly opposite to that alleged in the indictment.

The defense will show that we Communist leaders have taught that the American people should have confidence in their power and the power of the people to help prevent another World War and we have taught that for the first time in history the peace camp is stronger than the war camp and we have directed our efforts in favor of peace.

. . . . . .

—Tr. Tr. 1171—

The Court: Now, Mr. Dennis, that is the end, that is enough. You are not going to go on any more with that and you will kindly desist. I have tried to be just as patient as I could here and it is evident to me that, while you understand what I have told you, you are determined that you will go on and bring in all these irrelevant matters. So, I have no other alternative now than to tell you to desist.

Defendant Dennis: May I proceed to a different point, your Honor?

The Court: Well, I have had you purportedly go to a different point three or four times and it just seemed the same old—

Defendant Dennis: On the contrary, your Honor said that I might continue, and at various points I did continue. I now ask permission, if—I only yield—

The Court: As I said, you are going to be a terrible problem for me, I don't know what I am going

to do, because you just have it in your mind that you are going to go into wage increases, the Spanish War, the Chinese War, all these things under the sun, and I don't know, frankly, how I am going to stop you without taking some action that I don't want to take.

* * * * *

—Tr. Tr. 1173—

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Defendant Dennis: And it is on the question of peace, on the question of defense of the Bill of Rights, and the question of the living standards of the people. These are the things.

The Court: You see, after I tell you to stop, you look me right in the eye and you say it all over again. Now, it may be that there will be no alternative other than to just let you go on talking and then I will do a little talking, and then we will dispose of it in the course of time. So you may go ahead now with just what you proposed to add and we will see what it is.

Defendant Dennis: May we have a recess, your Honor?

The Court: Well, you are going to have a recess in three minutes. Go right ahead to the next point, so you will get a little more of it done. Then you can continue after lunch.

Defendant Dennis: Under protest—

The Court: If you have forgotten your trend there and desire the adjournment to examine your notes, I will let you do that, and I hope you will take the advantage of the time to try to keep a little bit more to the point here this afternoon.

* * * * *

Colloquy

—Tr. Tr. 1300—

New York, March 22, 1949

Mr. Sacher: May it please the Court, I do think that your Honor has overstepped the bounds of propriety this afternoon. Coming as your remarks did after three openings each of which denied that the defendants or any of them had been guilty of the charge contained in the indictment, and bearing in mind that each of the counsel who spoke this morning as well as each of the counsel who spoke yesterday spoke on the facts and in support of that which he was going to prove, I submit that the only effect of your Honor's observations upon this jury could have been to negate each and every factual statement that was made.

—Tr. Tr. 1301—

The Court: That is a pretty broad statement.

Mr. Sacher: That is a broad statement but I would like to make it a little broader.

I have sat here and watched your Honor scratch his head and smile incredulously at statements made by counsel and resort to a number of things each of which must have had the effect on the jury of negating—

The Court: I may have scratched my head, I don't recall, but as far as the other things it is positively not so.

Mr. Sacher: It is very strange that on the occasions when you scratched your head and pulled your ear, we were speaking and not Mr. McGohey.

The Court: Maybe you were not watching me.

Mr. Sacher: I just want to say that your conduct at all times—you see, you are doing it again.

The Court: I know, you are going to say I am corrupt and I am disqualified. You called me all those things before. Now you can run the catalogue again and I will listen patiently. Make it just as bad as you can.

Mr. Sacher: Your Honor, I am certainly aware of the fact that if I bear false witness against your Honor in anything I have said that I am subject to disciplinary measures and I am not inviting disciplinary measures by making false statements.

—Tr. Tr. 1302—

The Court: You mean that I will take disciplinary measures against you because you said I scratched my head? Don't be absurd, Mr. Sacher. Don't be absurd.

Mr. Sacher: The point I am making is that in every available means your Honor is conveying to the jury your lack of sympathy if not hostility to the defendants, their counsel's presentation of the case, and in these circumstances I want certainly to note on behalf of my clients a vigorous objection to your Honor's conduct and I wish to join Mr. Gladstein in the motion to declare a mistrial by the withdrawal of a juror.

The Court: Motion denied.

Mr. Crockett: If the Court please, I submit that the statement of the Court given to the jury and considered in the context and the circumstances in which it was given, and the emphasis evident in the Court's tone of voice, and your Honor's facial

expressions, necessarily prejudiced the minds of the jury against my clients and makes it impossible for my clients to have a fair trial before an impartial jury as guaranteed to them in the Fourth and Fifth Amendment of the United States Constitution. Because of this I join in the motion made by Mr. Gladstein and adopted by Mr. Sacher to the effect that this Court declare a mistrial at this time.

The Court: I used no particular tone of voice

—Tr. Tr. 1303—

and no unusual facial expressions, and the motion is denied.

Mr. McGohey: May I be permitted to make an observation?

The Court: Yes, you may.

Mr. McGohey: I wish the record to show that I sitting at this first counsel table have been watching your Honor throughout the opening statements by counsel for the defendants and by the defendant Dennis himself, and on my Honor as a member of the bar of this court I have observed nothing that would indicate an opinion of the Court one way or the other, and certainly, in so far as objections which I made to statements which were made by counsel for the defense and by the defendant Dennis himself, I am certainly not satisfied that your Honor has been as accurate as I think you ought to have been. I thought you were more liberal than I thought the defense were entitled to for you to be. And I want the record to note that I deny any action, any facial expression, any tone of voice, any gesture on the part of the Court which could reasonably by any stretch of the imagination have been interpreted

to indicate a trend of mind by the Court one way or the other.

And furthermore, observing the jury I represent that in so far as I could understand and interpret

—Tr. Tr. 1304—

the expressions of the jury, nothing that the Court did had any effect upon the jury's thinking.

The Court: Now you have some motions to make.

Mr. Isserman: If the Court please, I have, and in connection with that motion I would like to present it to your Honor and present Mr. McGohey with a copy if I may (handing to Court and Mr. McGohey).

The Court: I want you gentlemen to understand that when I scratch my head I am just plain scratching my head. I don't intend to stop doing that because you made these statements here. I have a habit of doing that. I am not going to stop just because you make these remarks.

Mr. Isserman: If the Court please, this is a matter which has been before the Court before on several occasions, that is, at least informally before the Court in the course of an opening address by Mr. Dennis. I ask the Court notwithstanding that to give it complete and full consideration because of the gravity of the matters contained in it which, on the one hand, deal with the right of the defense to the full presentation of the evidence in their favor and, on the other, deal, whether we will it or not, with the health and welfare and life of the defendant William Z. Foster whose trial has been severed from this case.

This motion is a motion for this Court to recon-

—Tr. Tr.—1305—

sider the application made by the defendants heretofore to take the deposition of William Z. Foster under such circumstances as, one, will not interfere with the conduct of this trial and, two, that will not unduly jeopardize his health. We have specifically requested heretofore that that deposition be taken by way of written interrogatories and answers thereto as provided for in the rules of Civil Procedure that are applicable in this kind of case. There is a new fact in addition to the others which we urge, which we ask the Court to consider on this essential question, that the absence of Mr. Foster's testimony is of such nature and such character that it will result on behalf of these defendants, or is likely to result in a failure of justice. We have on previous occasions set forth in general the reasons why Mr. Foster's testimony was unique and special and important in this case. We have said, described that testimony necessarily, only in general, for two reasons. One was that the indictment is not specific. We have not gotten the particulars we asked for. And secondly, because there are matters in that testimony which appropriately should be made and stated only after the Government's case is in.

Now the new matter which we call especially to the Court's attention is contained in the affidavit of Carl Winter, which is next. And it refers to the

—Tr. Tr. 1306—

references made by Mr. McGohey in the opening statement in respect to Mr. Foster. Those are found on page 2.

The Court: Now just a second. Let me read that.

Colloquy

Mr. Isserman: Pages 2 and 3 of the affidavit.

The Court: Starting at the bottom of page 2?

Mr. Isserman: That is correct, your Honor.

The Court: Very well.

Mr. Isserman: There can no longer, your Honor, be any question about the materiality and relevancy of the testimony of Mr. Foster because we cannot let the opening statement stand where it is. It is merely an indication by the Government of what it intends to prove in this case. The numerous references to Mr. Foster as a leader and a chairman of the Communist Party are such that make it abundantly clear that his testimony is necessary, relevant and material to the issues in this case.

But more than that, the defendants, all of them, feel and their counsel feel that the absence of that testimony will result in a failure of justice.

Now I call to the Court's attention also the petition which Mr. Winter who made the affidavit has incorporated in his affidavit.

The Court: Yes, I just noticed that. I am not going to receive that. You know, the other day, one of

—Tr. Tr. 1307—

the defendants got up and said he had a petition which he said the other defendants signed but that they had not consulted with their lawyers about. I wasn't sufficiently advised at the time as to what the law was, so I took it and examined it. I have since examined the law and it is my interpretation of the decisions that when defendants are represented by counsel, and this is a joint petition signed by the defendants, that it is a matter within the discretion

of the Court as to whether or not it will be received, and in the exercise of that discretion I refuse to receive that petition. I will consider the motion, however.

Mr. Isserman: In connection with the motion the petition—

The Court: What did you need to have the petition by the defendants for? You have got the lawyers all here.

Mr. Isserman: Exactly. The point I make here is that the defendants out of the urgency of the case and out of their needs have felt the need of addressing your Honor in this way. The point I make is that the allegations of the petition and forgetting for a moment its form have been incorporated in the affidavit and there the fact is stated, which is important, that Mr. Foster is an eminent world authority—

—Tr. Tr. 1308—

The Court: Where does it say the petition is incorporated in the motion?

Mr. Isserman: That is found in paragraph 3 of the affidavit which says that the statement is attached and made part of the affidavit.

The Court: Wait till I find it.

3, you are talking about? Page 3?

Mr. Isserman: I am talking about paragraph 3, on the last page of the Winter affidavit. The mimeographed copy I have is a little blurred on the page number. Paragraph 3.

The Court: Well, you see, that is rather repetitive language. It is described as a joint statement

and petition and then you have this language: "Further indicated and supported by the joint statement and petition signed by each of the defendants herein, including myself, which said statement is attached hereto and made a part of this affidavit."

Of course, the petition is also attached.

Mr. Isserman: It is true, but the petition is not a fact; that is a form in which the statement is in. The statement contains the fact.

The Court: I don't consider that an appropriate way to present sworn evidence. The petition is unsworn. If you want to make a motion and have that

—Tr. Tr. 1309—

petition as part of it I will not consider it. You will have to take the papers back and reframe that.

Mr. Isserman: If your Honor please, I present the papers as they are and, if your Honor refuses to consider the matter in the petition even as to the factual allegations, I will take exception to that.

The Court: I will take the motion as made orally on the basis of the oral statements you have made as an official of this court and a member of the bar and I will consider in connection with that your argument thus made. I will give the matter reconsideration. In fact, I have given the matter reconsideration and the motion is denied and I pass back the written papers.

Mr. Isserman: Before your Honor rules, I did want to make another statement as an officer of this court which I take to be true and that is that Mr. Foster is an eminent world authority on Marxism-Leninism and as such has played a unique and funda-

mentally important part in the development of the Communist Party of the United States, and for that reason his testimony is essential, and I would like to make one more statement, your Honor, and that is this:—and this I know of my personal knowledge—

Mr. Foster is most anxious to be a witness in this case and is contemplating taking that step against the orders of his doctor, and he is contemplating

—Tr. Tr. 1310—

taking a step which I know from his doctors will jeopardize his life.

The Court: Then he better not do it.

Mr. Isserman: And therefore we ask the Court to consider very carefully his right to submit his testimony by deposition and again I say in a way that can be worked out which will not interfere with this trial or unduly jeopardize his health. The defendants believe and counsel believe—

The Court: Just let me say something. Mr. Isserman, I wrote my opinion in that matter last November anticipating that some such question might come up and somebody might say, "You are practically forcing him on in his ill condition." Nobody is forcing him. You had the chance since my opinion was handed down last November to take his deposition in the interval. My opinion practically invited you to do that in the interval between the time my opinion came down in November to January 17th, but you didn't decide to do it. If he decides to be a witness it will be nobody's fault but his own and that of various counsel for the defendants.

Colloquy

Mr. Isserman: If the Court please, there is one fact I would like to call to the Court's attention, and that is there is no way of taking the deposition of a defendant and Mr. Foster is a defendant and was

—Tr. Tr. 1311—

not severed until January 17th. And we ask the Court to consider this fact that it is entirely possible to take such a deposition and that the ends of justice would be served if it is taken, that the ends of justice require it, that this Court should desire that every fact, including Mr. Foster's participation in the acts covered by the indictment should be presented to the jury, and we ask the Court to consider very seriously the taking of his testimony in such a way that it will be before the jury and will not be of jeopardy to his health.

The Court: I have considered it. His deposition will not be taken.

Mr. Isserman: If your Honor please, I object to the ruling on the ground that the denial of the right to take his deposition is a denial of due process to the defendants.

The Court: Very well.

Defendant Dennis: May I be heard very briefly?

The Court: Yes, you may.

Mr. Dennis: With respect to the petition of the twelve defendants, it is unfortunate that your Honor has not seen fit to read it, let alone receive it. I want to state to the Court that we did not draw this up as a perfunctory matter.

—Tr. Tr. 1312—

We took this step because of the very profound and deep concern and conviction of all of us that it

is necessary to petition for a redress of a very deep injury and an injustice to each of the defendants individually and to all of us joined in the trial. In respect both to the petition, which speaks for itself, and to the motion submitted by Mr. Isserman, I think the Court should give further consideration to the fact that not only is this not an ordinary trial, an ordinary trial, but that Mr. Foster is not an ordinary man or an ordinary member of our party. He is the National Chairman of our party. He is one of the founders and a leader of our party since its existence. He is the foremost Marxist in these United States, and certainly he has played a key and a very central role in respect to all of the issues which are joined in this trial, and therefore we consider particularly, and in addition since Mr. Foster in effect is being tried in absentia, that to refuse to grant a deposition would deprive both myself and my co-defendants and Mr. Foster of due process of law of our most elementary constitutional rights. I think your Honor would grant that this would be a different situation, or certainly most people would, that it would be really unthinkable in these United

—Tr. Tr. 1313—

States if any other political party or any national organization were involved in any court case, no matter how petty, how minor, where the chairman or the president of that organization would be prohibited from being a witness, be it through oral testimony or through a deposition.

The Court: You say I have prohibited him from being a witness.

Colloquy

Defendant Dennis: In effect, and I will just conclude, your Honor, on this point.

The Court: Well I deny that; I haven't prohibited him at all.

Defendant Dennis: I wish to make it clear that I and my co-defendants consider that the testimony of Mr. Foster is so indispensable that at all costs in one way or another it must be presented and submitted to the jury, and therefore it seems to me that the Court is faced with a very grave and serious alternative, whether to grant the taking of deposition under expeditious conditions or to compel Mr. Foster to be a witness where his appearance in this court could only result in fatal consequences, and that is not just my personal opinion or of his personal physician; it is also the opinion, your Honor, of physicians appointed by the Court.

—Tr. Tr. 1314—

And I respectfully urge that your Honor reconsider the motion and give due and earnest consideration to the petition which we 11 defendants have submitted.

The Court: As to the petition, Mr. Dennis, is not particular important now, you didn't think I read it because it is hard for people to realize how experienced judges and lawyers can glance through papers readily, and I saw enough of it to see that it was on the same subject matter as the motion papers. That is not particularly important now. I made the ruling that I did about the petition because I wanted to serve notice on all the defendants here that if during the trial one or another of them got up and

began handing me petitions, that in all probabilities I would not receive them. I will exercise my discretion in every such instance, but I am not likely to receive it.

I don't see any use in that. If you have lawyers here, the lawyers can present the arguments in writing or otherwise; and if you have people represented by lawyers themselves continually offering petitions, next thing they will want to do is to make oral argument and we will have a lot of unnecessary confusion here.

As to the merits of the motion itself, I don't remember exactly how many times that motion has

—Tr. Tr. 1315—

been made. One might suppose, to listen here this afternoon, that it was the first time. But, oh no, that has been coming up again and again, and arguments have been made and I have listened to them, I have given the matter thought, and I gave it a lot of thought way back last November when I first heard that Mr. Foster was ill. And it isn't from any lack of consideration or any hasty action on my part, but the decision I made has been made after the most mature thought and consideration and deliberation on the matter.

And I am not going to have the deposition of Mr. Foster taken, nor do I consider myself to be in any such dilemma as Mr. Dennis has indicated.

Now, Mr. McCabe, have you something to add?

Mr. McCabe: Yes, your Honor. Of course, I suppose your Honor had in mind that Mr. Dennis, as

he was just addressing your Honor, was doing it also in the capacity as an attorney.

The Court: Yes.

Mr. McCabe: And I believe his name was signed to the motion.

The Court: If it had been a petition signed by him alone, why, I might have given some consideration to it. I suppose we will begin having those things in a little while. But don't forget that we had a long

—Tr. Tr. 1316—

talk in my chambers this afternoon, for ten or fifteen minutes, on this same subject and I stated I would deny the motion. And you went over the whole thing, backwards and forwards, and you come out here in open court and each one of you wants to have something to say all over again.

Mr. McCabe: I see, your Honor, the motion to reconsider repeated the motion which had heretofore been made on March 7, 1949, at the time I represented Mr. Dennis, and through an inadvertence, I suppose, contains my name as attorney for Eugene Dennis and Henry Winston. I think that is a detail—

The Court: You needn't worry about that.

Mr. McGohey: I would like to call your Honor's attention to the fact that this inadvertence must have occurred today because this paper that he is talking about is dated March 22. It is not a paper that is dated on March 7, before he was discharged as Mr. Dennis's counsel. It is today's date.

The Court: Even so, it is an inadvertence and of no moment.

Colloquy

Mr. McGohey: Like the citations, perhaps.

The Court: I don't think that it will ever be argued here that by such means Mr. McCabe has been re-

—Tr. Tr. 1317—

instated as Mr. Dennis's lawyer or anything of the kind.

I think it was an inadvertence, Mr. McGohey.

Mr. McCabe: As Mr. Foster's counsel, I recall your Honor's admonition, that your Honor has recalled on several occasions, of last November, stating that if we wished to take the deposition of Mr. Foster we should take some steps in that direction. Let me say that, apart from Mr. Dennis's position as a defendant at that time, that I, as his counsel, would have been at loss then to formulate depositions or interrogatories in the light of the information which we then had.

The Court: You mean, after Mr. McGohey's opening to the jury, now you know all the things you would have asked about?

Mr. McCabe: No, no. No, as I say, the information contained in the bill of indictment might have permitted some general questions which inevitably would have brought in matter which was irrelevant, which inevitably would, in the light of the testimony adduced by the Government, have to be repeated or revised or amplified.

Now, testimony on the part of a defendant is given, normally, certainly, universally, in reply to testimony given by the Government, given by the

—Tr. Tr. 1318—

prosecutor. What were we to do then? Were we to

explore every possible bit of testimony which we could conceive of the Government's introducing and answer that?

Your Honor denied our request for a bill of particulars on Mr. McGohey's highest protestations that we were demanding his evidence—we were asking for his evidence. Your Honor said, "No, that wasn't right." Well now—

The Court: What I really said was that Judge Hulbert had already denied the motion and I was going to follow his lead.

You know, you, Mr. McCabe, you and your colleagues, you make a motion once and it is denied. And then you make it again just as though you had never made it before. Then if it is denied again, the next time it comes up, you all look up as though you had never heard anything about it before. When a motion is made and considered and denied, that usually disposes of the matter.

Mr. McCabe: Except this, your Honor, that as the situation develops, it happens that the motion becomes more and more appropriate. I anticipate renewing this motion, if your Honor denies it this time, I anticipate renewing it after certain of the Government's testimony or after all the Government's testimony because, were we to put in writing

—Tr. Tr. 1319—

now all the testimony which Mr. Foster would give, obviously we would be doing just what Judge Hulbert, and in the position which your Honor adopted, said would be giving us the Government's case, we would be giving the Government every possible bit

of information which we have. And certainly your Honor will agree that the Government is not entitled to know in advance every jot and tittle of our defense.

The Court: Who said they were?

Mr. McCabe: Well, I say, compelling us to take the deposition of Mr. Foster, had we started out as was implicit in your Honor's instructions to take deposition of Mr. Foster last November, we would have had to cover the entire field of his knowledge and his acts, and the Government was certainly not entitled to have that prior to the preparation and presentation of this case.

I submit that justice will require that Mr. Foster's evidence, testimony, be got before this jury. The jury is entitled to have that testimony. It would be asking a jury to decide upon less than all of the available testimony, if they walk out of this box finally without having heard the testimony of a man whose actions, whose name will loom large in the Government's case.

—Tr. Tr. 1320—

The Court: If that is another motion, it is denied.

Is there anyone else to add something?

Mr. McGohey: If the Court please.

The Court: Yes.

Mr. McGohey: It was Mr. Dennis, I think, who made the observation, made the statement that Foster was being tried in absentia.

The Court: Oh, yes.

Mr. McGohey: Now, of course, we all know that Mr. Foster is not being tried at all. This indictment

has been severed as to him and nobody is prohibiting Mr. Foster or anybody else from being a witness, if the defense want to call them.

This is not the first case, of course—it seems carrying coals to Newcastle, certainly, to be talking about practice to your Honor who taught it for so many years—certainly this is not the first case in which a deposition has had to be taken and, of course, it is always usual, when you know in advance that a witness may not be available, to take his deposition.

It was represented to the Court that Foster's health was such that he might not live long enough to be available, and that has happened before. And it happens so many, many times that some witness

—Tr. Tr. 1321—

that somebody would like to have offered in a case is unable to be there, and if it happens at a time when his deposition cannot be taken, well, it is just too bad. But this is certainly something that has happened many, many times in litigation, and I urge your Honor—I think your Honor has denied the motion?

The Court: Yes.

Let me clear up this business about Mr. Foster being tried in absentia.

Defendant Dennis: May I say—

The Court: I should have disregarded that statement, if it had not been made two or three times before but, as Mr. McGohey said, Mr. Foster is now not being tried at all, he is not being tried in absentia or in any other way, and I should suppose

that that was sufficiently obvious to require no further comment.

Yes, Mr. Dennis?

Defendant Dennis: May I make a brief rejoinder to the remarks of the District Attorney?

The Court: Yes, you may. There isn't anything up for determination but the jury is gone, and I think this is a good time to do it.

Defendant Dennis: Formally, juridically speaking, Mr. Foster is not on trial but, in effect, de facto he is being tried in absentia. Formally, juridically,

—Tr. Tr. 1322—

there are 11 individuals who are now on trial, but in effect de facto the Communist Party is on trial.

The Court: Well, that I cannot agree with. If there is any conviction here, why, then it will be plain, I think, that those who are not being tried are going to be in a different position than those who are being tried, and there is no use in keeping on talking that it is the Communist Party on trial when I have stated, again and again, to the jury and otherwise, that the only persons on trial are these 11 individuals, not including Mr. Foster. Now, of course, I cannot stop people from getting up and telling me just the opposite, and I suppose that is just one of those things you have to bear with, but the fact is as I have just stated.

Now, I think we had better adjourn.

Mr. Gladstein: May I say one word?

The Court: Yes.

Mr. Gladstein: A little bit more than one word because one—

The Court: You did not mean literally one word.

Mr. Gladstein: The first thing I want to suggest, your Honor, is this: I am a little bewildered by the speed with which, on passing on our motions, you pass from the future tense to the past perfect tense —Tr. Tr. 1323— and to the present. A little while ago, in passing—

The Court: Which one?

Mr. Gladstein: —in passing on the motion, here is what you did: you said, "I will reconsider the motion. I have reconsidered the motion. The motion is denied."

The Court: That is just what happened.

Mr. Gladstein: It is exactly what happened, and it happened just that fast.

Your Honor must recall this: we are presenting this petition today, this application, this motion, however it is to be denominated, under circumstances which are different from any which have heretofore obtained.

The Court: That I deny.

Mr. Gladstein: It may be so, you may deny it, but the record is there, and one of the things—yes, the record is the one the transcriber has and that includes many mentions on the part of Mr. McGohey in his opening statement to the jury of the involvement of William Z. Foster in this case as a defendant.

Now, what was it Mr. McGohey said? For example, and you will find this in the transcript, whether your Honor denies it or not, Mr. McGohey said—

Colloquy

The Court: I don't think that I intended to deny certain statements appearing in the transcript. What

—Tr. Tr. 1324—

I intended to say, when I said I denied that, was that there have been lots of other cases similar to this. This is not the first time some man became ill and a case was severed. I have had many such experiences right in my own practice.

Mr. Gladstein: I am not talking about other cases, and I want to talk about this one.

The Court: All right.

Mr. Gladstein: And I don't know what happened in the other cases after the opening statement, but I do know what happened in this case. Mr. McGohey said the defendants in this case, the 11 defendants, conspired with William Z. Foster as alleged in the indictment. That is the record. He said that William Z. Foster is a defendant to the indictment on trial but his trial has been severed, but he is a defendant; he said William Z. Foster was present at the Convention which allegedly dissolved the Communist Party in 1944 and created the Communist Political Association; was named to the National Committee and so forth and so on. At that time, as Mr. McGohey said to the jury, apparently he intended to introduce evidence on it, William Z. Foster did not object to certain remarks which are supposed to have been made by Earl Browder. This is in the opening statement of Mr. McGohey. Mr. McGohey goes ahead

—Tr. Tr. 1325—

and he says, William Z. Foster, the defendant, was

elected head of the Communist Party in July 1945, when the party was allegedly—.

The Court: I am just scratching my head now. Do not pick me up on that, for goodness sake.

Mr. Gladstein: Well, your Honor, I would—

The Court: That is what happened before and you said it was very significant and I just—.

Mr. Gladstein: I did not say it was significant, but I hope some day it becomes as significant as my father's used to be because, when he scratched his head, he was doing some thinking and he usually came out with something very good.

The Court: I seldom do it, but once in a while.

Mr. Gladstein: I will wait and the first time you do, your Honor, I will get up and congratulate you for the result of the scratching.

The Court: I hope you do.

Mr. Gladstein: However, then it is charged—it is said by Mr. McGohey in the statement to the jury that on a certain date Mr. William Z. Foster accepted the view—accepted the view—of Jacques Duclos, leader of the Communist Party of France. This is even more—this is more than anything that has possibly been indicated to us at any time hereto-

—Tr. Tr. 1326—

fore as to the possible involvement of William Z. Foster because now Mr. McGohey is telling the jury that he is going to prove that Mr. Foster personally accepted a certain viewpoint.

Now, isn't it important for us to have the right, not just for Mr. Foster to have the right, but for all

of us, I for my clients, to have the right to challenge that statement as to whether Foster accepted somebody else's views? And elsewhere there was even talk by Mr. McGohey about—I read the record last night—about compliance—compliance, he said; obedience and compliance with somebody else's views.

Now, Judge, you cannot overlook for one second the insidious purpose of that kind of statement to the jury, and it is this: it is to try to get across by innuendo to that jury the idea that the mystery man who isn't here, William Z. Foster, and these 11 defendants who are here, were taking some kind of orders from somewhere else, something that they are not charged with, but that is what Mr. McGohey was, in effect, trying to cultivate in the minds of the jury.

Now, the least we are entitled to, apart from a direction to the jury to disregard that kind of—

The Court: You really improvise, Mr. Gladstein. You start with one thing and then you—

Mr. Gladstein: Foster is the only man who, in

—Tr. Tr. 1327—

the nature of things, because of the manner in which Mr. McGohey formulated that assertion, can deny the false character of that statement, because only Foster can state whether he did or did not accept somebody else's [illegible] view. Now, that is just one example, that is just one example, but that example alone should illustrate the importance to due process for these defendants, and your Honor has said many, many times how concerned you are to see that the defendants get a fair trial.

The Court: Well, I am too.

Mr. Gladstein: Then I trust that your Honor's concern will lead the Court to grant that which is not unusual, and nothing unorthodox about it, and which we request, namely, that a person who is ill, a person who has been stricken so that he unfortunately cannot be here to personally defend his life and his activities, will at least have the right to have his words brought from his sickbed to the jury, so they can know what the truth is. There is nothing unusual about that request and we make it, and we ask the Court to really give some consideration to it.

The Court: You know, that word "really," there, that is the way you do. You put that little sly insinuation in, as much as to say that heretofore I haven't really given the matter any consideration.

—Tr. Tr. 1328—

Mr. Gladstein: What does your Honor expect me to think when, for example, you announce, "I will give this consideration, I have given it consideration, and I now deny it"? You say that so fast.

The Court: If you think that you were going to get me to forget what I was going to say by your going on, you are mistaken, because I can remember what I was going to say, and it is that, making insinuations like that is not proper or fitting, and it is not a worthy thing for you to do. Now, you do it all the time, and perhaps you take advantage of the fact that I don't take any stringent steps about it, but I hope you won't continue that sort of thing.

Colloquy

Mr. Gladstein: I meant no offense by that and what I really meant was that the Court should reconsider this application in the light of what I have said, in the light of the new developments since yesterday.

Mr. Sacher: Will your Honor indulge me just a moment?

The Court: Yes.

Mr. Sacher: It seems to me, Judge, that even if this were a most ordinary criminal case that in a trial which putatively, at least, is an inquiry into the truth and the whole truth, there ought not only to be no reluctance, but there ought to be eagerness

—Tr. Tr. 1329—

on the part of, not only the Court, but of the prosecution as well, to receive the testimony of one of the persons charged with being a member of an alleged conspiracy.

Now what is it we are talking about—

The Court: We are talking about taking Foster's deposition.

Mr. Sacher: There is the first point I am getting at, your Honor, that what we are essentially discussing is the question as to whether the jury shall have the benefit of all of the facts in the case. Now I ask your Honor, can you conceive that an instruction by your Honor that the jury is to draw no unfavorable inference from the failure of Mr. Foster to testify can possibly take the place of a deposition by Mr. Foster? That cannot certainly take the place because all you are doing then, if you did that, and as I believe you will agree with me, you would be

obliged to make that statement—all that your Honor would be doing would be to say, you cannot punish these people for not having Mr. Foster's testimony, but by the same token you haven't given either the defendants or Mr. Foster the opportunity to lay before the jury the facts in the case, and it seems to me that all the fine talking we may do about American traditions and American notions of fair play I think will be belied if despite the innumerable efforts by the defense the prosecution opposes and the

—Tr. Tr. 1330—.

Court denies applications to have Mr. Foster's testimony. In that connection I would like to make the following observation also, that no matter how often your Honor may say that all that is involved here is the trial of 11 defendants, the fact of the matter is that this indictment specifically charges the Communist Party with being the teacher and advocate of certain doctrines alleged to be proscribed by the statute, and what is more, the so-called criminality of the defendants or the alleged violation of law is purely derivative, derivative from the fact that it is alleged they conspired—

The Court: You see, Mr. Sacher, it is katy did and katy didn't. You keep saying "katy did" and I keep saying "katy didn't," and you keep that up, and the funny part of it is you don't seem to realize that I always have the last say.

Mr. Sacher: I realize that.

The Court: Now I am the one who is deciding this thing here. You and your colleagues think that when

you talk it is a voice from Heaven, because the lawyers say so. This is the first time I ever heard of such a doctrine, and what I decide can be reviewed, but lawyers talk, insisting on this and that and the other thing, as you do here, it proves nothing.

—Tr. Tr. 1331—

Mr. Sacher: Your Honor, I am simply—I am not trying to prove anything right now. I am inviting—

The Court: But you bring the subject each time as though we have never heard of it before, and as I am saying, it is like Katy did and Katy didn't, and then we keep it up, and then let it go by, to be resumed at a later time.

Mr. Sacher: But it seems to me that as the case has progressed it has reached a point since Mr. McGohey's opening of yesterday which indicates how flagrantly unjust it must be, first to the defendants on trial, because that is the primary consideration for everybody involved in the trial, to deny them the benefit and the assistance of testimony by the man who was basically the architect of the change that is complained of by the prosecution. And, secondly, it seems to me in the interests of ascertaining the truth and the whole truth it is absolutely essential—

Mr. McGohey: Will your Honor please excuse me? I have to get to the doctor with an infected gum.

The Court: Yes, you may go.

Mr. McGohey: I am sorry.

(Mr. McGohey left the courtroom.)

Mr. Sacher: It is absolutely essential as a matter of, well—what shall I say? —decency to Mr. Foster,

—Tr. Tr. 1332—

decency to permit a man who occupies the position, the status and the role in the life of this Party to give his testimony. Now it is not a question of reducing this thing to this amusing little that your Honor speaks of, of Katy did and Katy didn't. It seems to me rather that what we are speaking of is something that constitutes—

The Court: Well, the context in which I made that is not what you are now talking about but what you were talking about a few minutes ago, namely, that you insisted that others were on trial than these eleven defendants; that you have kept asserting, your colleagues have kept asserting, and I have asserted on the contrary that the only persons on trial are these eleven individuals, and that is what I said the Katy did and Katy didn't about. So don't transfer that to some other subject and go on in that way.

Mr. Sacher: Now I am encouraged to believe, your Honor, that in the light of these new considerations, that is, the new considerations being the developments coming out of Mr. McGohey's opening, that it would be nothing more than fitting and proper for your Honor to give this matter further consideration and to weigh the justice of the matter and to give us the benefit of your deliberations, perhaps at a time when you are not as agitated as you

—Tr. Tr. 1333—

are now.

The Court: I am not a bit agitated. Now Mr. Sacher, what is the use of making ridiculous remarks like that? You tried to make it look like when I am

scratching my head I am signaling to the jury, and now I am in a most agitated way, and I never was in a more gentle mood than I am this minute.

Mr. Sacher: Then I request your Honor to reconsider the matter and grant the application.

Mr. Gordon: May I be heard briefly, your Honor?

The Court: I think, Mr. Gordon, if you will just resume your seat I will dispose of the matter—unless there is something important that you want to add.

Mr. Gordon: Just to urge, your Honor, that the motion does not show the legal requirement that this testimony is exclusive and necessary. There has been a lot of talk but no motion, really, claiming the vital necessity of this testimony, and for that reason we urge that if your Honor does reconsider it, that you again deny the motion.

Mr. Isserman: If the Court please—

The Court: I knew that, Mr. Gordon.

Mr. Crockett: I can assure the Court it is not merely because Mr. Gordon has just resumed his

—Tr. Tr. 1334—

seat that I want to be heard, but Mr. Gordon makes the point that the motion does not meet the legal requirements. As I read the Federal Rules of Criminal Procedure, there are two requirements, neither of which requires that there be a showing that the testimony is exclusive to the particular witness. There is a requirement that the testimony be material, that is one, and, two, that it be necessary to prevent a failure of justice.

Colloquy

In the preparation of the former motion papers, which your Honor has seen fit not to receive, particular attention was paid to satisfying those two requirements. Those popers, I respectfully submit, are in proper order. The affidavit attached thereto was an affidavit of my client. It was incorporated in the motion, and therefore becomes a part of the motion. The so-called statement or petition which was attached to the affidavit was incorporated in the affidavit, was also signed by my client, and therefore becomes a part of the motion.

I submit that the Court should really receive that former motion. Before continuing on with what I have to say, however, in order to be technically in order on the record, I should like to move now for a reconsideration of the motion to permit us to take the deposition of Foster. In that connection I want to point out just one thing: the Court has mentioned

—Tr. Tr. 1335—

on several occasions, and Mr. McGohey has mentioned at least here today, that there seemingly has been some unseemly delay on our part in applying for permission to take this deposition. Your Honor is aware, I am sure, that in criminal cases the rule regarding depositions is slightly different than from what it is in civil cases. In civil cases no previous application to the Court, no formal order by the Court is necessary to take a deposition. In a criminal case we would, of course, be out of order if we proceeded to take the deposition of Mr. Foster without first getting an order from your Honor permitting us to take it and requiring Mr. Foster to give us that testimony.

Colloquy

Now the point that I wish to emphasize is this: Up until January 17th of this year, and certainly at the time that your Honor's opinion came down—the opinion to which you recently referred—

The Court: Yes; that was in November.

Mr. Crockett: Yes; Mr. Foster was a defendant in this case, and under the Federal Constitution not even this Court could compel Mr. Foster to give us any testimony by deposition or otherwise.

Mr. Gordon: You still cannot, your Honor. He is still a defendant. This is just talk.

Mr. Crockett: It was not until after the Court

—Tr. Tr. 1336—

entered the order severing Mr. Foster so far as the trial of this case is concerned, that it became possible, legally possible for your Honor to grant us permission to take his deposition.

The Court: How is it possible now? He hasn't said anything, has he?

Mr. Crockett: It is possible if we can get the order from your Honor. Now if Mr. Foster refuses to give us testimony—and I have no reason to assume that he wouldn't; on the contrary, I am sure he will be glad to do so.

The Court: Why should I assume that he would have objected in November? The natural assumption is that he would do everything he could to help the other defendants; isn't that so?

Mr. Crockett: That is exactly so, and so much so that I do not see why the Court does not grant us permission to take his deposition.

The Court: Well,—

Colloquy

Mr. Crockett: Let me make my second point, if I may.

The Court: All right.

Mr. Crockett: There are two points. In the first instance, you decide whether you are going to allow us to take the deposition. That doesn't necessarily

—Tr. Tr. 1337—

place Mr. Foster's deposition before the jury. You still have an opportunity at the time we offer to read that deposition to the jury to decide then whether or not Mr. Foster's testimony should be presented to the jury.

The Court: Now Mr. Crockett, I am not going to direct the deposition of Mr. Foster to be taken, and go on here, after being represented to me in the conference in chambers to let the jury go because it will just take a minute or two in here. We have been three-quarters of an hour on it. Now I tell you I am not going to direct his deposition to be taken.

Mr. Crockett: I don't recall telling your Honor that it will take only a few minutes. On the contrary my understanding was that your Honor indicated even before the motion was made to us in chambers that we would be permitted to make the motion but that you would deny it.

The Court: That is right. That is just what I said.

Mr. Crockett: But you also indicated that there have been occasions when you changed your mind even within a short period of time.

The Court: Yes, that is right, and the more you argue the more determined I am that I am not going

to permit the deposition to be taken, so this is one time that in a short time I did not change my mind.

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—Tr. Tr. 1358—

New York, March 23, 1949

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The Court: Now you know I have reasonable intelligence and when you make an objection once and you make it twice and you make it three times I may be assumed to understand the first time. Now when you object and you are overruled, you have an exception, as you understand, and I don't think you need to go into those long discussions on it—it wasn't very long, really, but I understood your point the first time and I make the same ruling.

Mr. Isserman: But, your Honor, my first objection was to the question. Now I move to strike out the answer which clearly indicates no relevancy at all, so I am really making a different motion at this time. I feel I must make it to defend my clients.

—Tr. Tr. 1359—

The Court: If it is a different application, I will deny the motion.

Mr. Sacher: Will your Honor be kind enough to state for the record that in the course of the trial the benefit of objections and exceptions made by any individual counsel on behalf of his clients will accrue to all of the defendants?

The Court: Yes. I have already said that several times and I repeat it now: any objection made or

any exception noted will inure to the benefit of all of the defendants unless the counsel for some particular defendant states on the record that he does not wish to take advantage of the exception or objection so that it may thus be entirely unnecessary for the counsel for the various defendants to get up and say that they also join in the objection.

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—Tr. Tr. 1372—

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Mr. Sacher: I object to that as leading and suggestive to the witness, obviously so.

The Court: Well, I tried to indicate a little while ago that as to some matters I will permit leading questions. It seems to me fairly obvious that that is what the witness meant.

Mr. Sacher: I don't know that anything can be taken for granted as obvious with this witness.

Mr. McGohey: I move that that remark be stricken out.

Mr. Sacher: Your Honor, this man, Mr. Gordon, just turned around and pointed his finger at me and said, "Sit down." I want to call that to the Court's attention. I will not permit myself to be terrorized by counsel for the Government.

—Tr. Tr. 1373—

The Court: I see you are returning to your old role.

Mr. Sacher: I object to your Honor's remark and I ask your Honor to instruct the jury to disregard your statement.

The Court: Mr. Sacher, I dislike shouting and disorder and I will not tolerate it. I don't know what little passage may have occurred between counsel here but there is no conceivable justification for your carrying on this way.

Mr. Sacher: Your Honor, Mr. Gordon turned around and he faced me and waved his finger at me and said "Sit down."

Mr. Gordon: That is not so.

Defendant Gates: Your a liar.

The Court: You have waved your finger at me and that doesn't bother me. I don't see why you get so excited.

Mr. Sacher: Well, your Honor—

The Court: Let's let these little incidents evaporate and not occur any more.

Mr. Sacher: May I respectfully ask that you tell the Government to desist from facing defendants' counsel. Their back is supposed to be turned to me and I prefer to see that part of them.

—Tr. Tr. 1374—

The Court: You see how one thing may lead to another without profit to anyone. We get into a dispute as to whether something was said or whether it was not. I think the wiser course to pursue is let's forget it.

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—Tr. Tr. 1505—

New York, March 24, 1949

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Mr. Crockett: If the Court please, I object on behalf of my client to the admission of this document

in evidence for the reason that it is apparent, from the face of the document, that it is remote; it is not relevant or material to any issue covered by this indictment, or for the period covered by this indictment. I object further because there is no proof that this document was issued by the authority of the

—Tr. Tr. 1506—

National Convention of the Communist Party in 1945 or since 1945 and, therefore, its admissibility in evidence will constitute a denial of due process to my client under the Fifth Amendment of the United States Constitution.

The Court: Overruled.

Mr. Isserman: If the Court please, I object to the admission of this pamphlet of some 125 pages on the ground that its contents in no wise support the charge in the indictment that the defendants between the period 1945 and 1948 conspired to advocate the overthrow of the Government of the United States by force and violence; on the further ground that the use of this document under the circumstances indicated by the witness is protected by the First Amendment to the United States Constitution, and to receive it in evidence is a denial of due process of law and a violation of the Fifth Amendment; on the further ground that the document is remote, not relevant and not material to any issue in the indictment, which covers only the period from 1945 to 1948, and on the final ground that there is no proof before this Court that the document was issued by the authority of the National Convention

of the Communist Party in 1945, or by any subsequent convention or by the regularly constituted

—Tr. Tr. 1507—

leadership of that Party as provided for in Article 14 of the constitution of that party, referred to in paragraph 6 of the indictment, and which article we hereby offer to prove, nor was the document issued by the authority of any defendant—

The Court: Now, Mr. Isserman, with another couple of days of this type of objection I am going to have to rule the way I did earlier in this case, that counsel shall restrict themselves to the objection. Now I do not want to do that but I notice that this so-called statement of objections gets longer and longer and is not in accordance with the traditional way of doing these things. I don't intend to have the greater part of each court session taken up with these long-winded objections, especially when they are largely repetitious. Now I just want to indicate that you can do it and your colleagues can do it in very much the same fashion and protect all the rights of your clients in doing it.

Mr. Isserman: Now if the Court please, I was about to finish by saying, nor was it issued by the authority of any defendant during the period from 1945 to 1948, and I would like to respectfully object to your Honor's characterization of my statement of the objection on the ground that under the authorities it is not only necessary to object but to state the

—Tr. Tr. 1508—

grounds of objection with particularity. This docu-

ment was not offered before, and I stated the grounds as I conceive them to be under the law. I have made no argument in respect to it.

The Court: Overruled. This is being received only against the defendant Stachel.

Mr. Crockett: If the Court please, I would like the record to indicate my objections to the Court's use of the word "against."

The Court: What word?

Mr. Crockett: The word "against." Yesterday your Honor used that word. The mere fact that this witness is testifying does not mean that he is testifying against.

The Court: What word do you think I should use instead of "against"? "In favor"?

Mr. Crockett: I don't think your Honor should pass prejudgment that this evidence is against my client.

The Court: It is offered against him and it is being received against him.

Mr. Crockett: I want the record to note my objection.

The Court: Certainly the Government isn't introducing it against the Government. I never heard of such quibbling.

(Government's Exhibit 4 for identification received in evidence.) —Tr. Tr. 1509—

Mr. Isserman: May I have the number of the exhibit?

Mr. McGohey: Exhibit 4.

Budenz—Direct
Colloquy

Q. Mr. Budenz, did you use this document, Government's Exhibit 4—

Mr. Gladstein: Object to that as immaterial.

The Court: You may continue, Mr. McGohey.

Mr. McGohey: May I finish my question, if your Honor please?

The Court: You may finish your question, yes.

Q. —in connection with your work on the Daily Worker during the period that you worked on that paper as you have testified? A. Yes, sir, during the entire period.

Q. During the entire period? A. Yes.

The Court: Do you object?

Mr. Gladstein: I object to it as immaterial and a conclusion, not within the issues of this case.

The Court: Overruled.

Q. And did use it particularly between the period from April of 1945 up until the time that you left the Daily Worker?

Mr. Gladstein: Now I object to this as very leading and suggestive.

Mr. McGohey: May I ask leave to at least finish

—Tr. Tr. 1510—

the question before the objection is made?

The Court: Yes, yes, I think, Mr. Gladstein, in your zeal to object you might wait until the question is formulated.

Mr. Gladstein: I have no zeal to object. I just think when the United States Attorney offers a question that is leading and suggestive, it is my job to get up and call it to the Court's attention. Now this is a witness who answers quickly—

The Court: You know, Mr. Gladstein, when you interrupt your adversary continuously in the middle of a question it is disconcerting, it isn't helpful, and it is a form of disorder in the courtroom. Now I want you to stop it.

Mr. Gladstein: I have no intention of being disorderly.

The Court: Then stop it.

Mr. Gladstein: May I make my objection or—

The Court: You wait until the question is formulated. Then you may make your objection.

* * * * *

—Tr. Tr. 1572—

The Court: Let me get that name straight. There was this meeting of the National Committee of the Communist Party in January?

The Witness: That is correct.

The Court: Now, you have been talking about a later meeting at which you were not present.

The Witness: Within a month, yes, sir.

The Court: And that apparently is some new kind of committee?

The Witness: No, that is the same—it was a hastily gathered together same committee.

The Court: Without going into whether it was hastily got together, it was the same National Committee of the Communist Party?

The Witness: In part.

The Court: Or was it a new committee?

The Witness: There were some National Committee members there and some who were not Na-

—Tr. Tr. 1573—

tional Committee members, I was told.

Mr. Crockett: I object and move to strike it out. The witness has already testified he was not present, so how can he know and now testify as to who was present?

The Court: I want to know simply what he is talking about. I am not trying to find out who was present.

Mr. Crocket: Well, your Honor, in effect, what you are doing is having the witness testify. That is the only way you can find out what he is talking about.

The Court: It seems to me he is about to tell us what Mr. Davis told him about this meeting, and all I am trying to do is find out what meeting he is talking about but, as you object to it, I will drop the subject and let the thing be pursued by Mr. Gordon.

Mr. Gladstein: Since Mr. Gordon is taking a moment before commencing his pursuit again, I would like to object to this on the grounds that it is hearsay and no foundation has been laid, in so far as my clients are concerned.

The Court: You know, Mr. Gladstein, with all these objections, such an atmosphere of confusion seems to be arising here that you cannot keep head or tail of anything in your mind. Now I just want

—Tr., Tr. 1574—

to mention that, and pretty soon I am going to have to do something about it. You cannot follow the testimony with any continuity because there is all this wrangling and discussion over points that seem to me, like this Williamson one, matters of absolute triviality, and I hope that you will just try to refrain a little bit so I can follow the proof.

Mr. Gladstein: Your Honor, I think I am entitled to a ruling on this. I urge an objection upon the ground that, from the testimony so far given by the witness, what is now sought to be elicited would be hearsay as regards my clients, and I take it from the rulings that the Court has made heretofore that my objection is well grounded.

The Court: Well, I am receiving this preliminary material only against the individual who was present or who made the various statements from time to time.

Mr. Gladstein: That is the point of my objection.

The Court: That is my ruling as at the present time.

Mr. Gladstein: That is the point of my objection, and I had not heard your Honor make a ruling.

The Court: Well, I do make that now. I make it now.

Mr. Isserman: If the Court please, I would like

—Tr. Tr. 1575—

to object to your Honor's characterization of the conduct of counsel in respect to objections as being an undue interference with the right and necessity of counsel to represent their clients in court and as

tending to prejudice the proper actions of counsel before the jury.

The Court: Well, I find it most confusing. I can hardly follow the proof, there is so much objecting here on these preliminary things, and some of it, as I said before, on what I consider to be utter trivialities—this repeated objection by Mr. Crockett on the ground that proof was admitted against his client, which obviously it was, and that is done all the time.

Mr. Crockett: If your Honor please—

The Court: You want to talk some more, Mr. Crockett?

Mr. Crockett: Your Honor will recall I asked for a continuing objection so I wouldn't have to disturb your Honor by objecting each time.

The Court: And it isn't the disturbing, Mr. Crockett; it is the utter triviality of the objection that I am commenting on.

Mr. Crockett: On that point I will have to differ with your Honor; and since I am the one who has the responsibility of representing my client, I think I have a right to get up and voice objection whenever

—Tr. Tr. 1576—

one should be made.

The Court: But you get up pretty often. You probably will continue. I am just suggesting that, if possible, counsel could limit the number and character of these objections so that we can listen to the proof and keep our minds on what is going on.

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—Tr. Tr. 1583—

Mr. Gordon: I offer it in evidence.

(Mr. Gordon hands to Mr. Sacher.)

Mr. Gordon: I note that Mr. Sacher has a copy—

Mr. Sacher: Just a minute.

Mr. Gordon: —has a copy of that exact exhibit on the table in front of him.

Mr. Sacher: Now if your Honor please, you will observe that I have to build things around here so that counsel for the Government won't observe so

—Tr. Tr. 1584—

much as to what is transpiring on my desk. Now this is an acknowledgement by him that we are under sort of surveillance. Now may we not have the freedom to have things on our desk and to read them without having publication given to what we have on our desk and what we are reading?

The Court: Mr. Sacher, I have been watching too, and it has seemed to me possibly that a paper might be offered and time be taken solemnly to hand it from one to another of counsel and look it over and turn it over when all the time you had your own copy right there and knew all about it.

Mr. Sacher: If your Honor please, you will observe—

The Court: It seems to me it may be, if that is so, we could save a little time by having you just glance at the paper and make your objection and be done with it.

Mr. Sacher: I would like to make this observation: You will observe that in regard to Exhibit 8,

the prosecution offered two pages of it. Now it therefore becomes necessary to see what those two pages are and what the contents are, and the same goes for any document, and besides we don't have dozens of them—

The Court: You can take all the time you want.

Mr. Sacher: What is that?

—Tr. Tr. 1585—

The Court: You may take all the time you want to examine it.

Mr. Sacher: If your Honor please—

The Court: You are not going to create any issue here.

Mr. Sacher: This thing was created solely as a result of surveillance by Mr. Gordon and his observations, and I suggest that there ought to be an end to it. We ought to have the freedom to prepare our case and present it without surveillance from the prosecution.

The Court: You are having no surveillance. There is no use trying to raise a rumpus here.

Mr. Isserman: If the Court please—

The Court: Just go about looking at the paper and make your objection and stop this nonsense.

Mr. Isserman: If the Court please, I would like to object to your Honor's remark in respect to defense counsel and the way defense counsel is handling this case. We have just been handed a document of some 141 pages. We have a right to check it with the copy that we have to see if it is a copy. Many of the pamphlets that have gone in have gone through six and seven and ten editions,